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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-855

LEGGETT & PLATT, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY IN SUPPORT OF PETITION

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I. THE GOVERNMENT'S BRIEF DISTORTS THE RECORD

The Memorandum for the United States (hereinafter "Government") completely distorts the record. For instance, it indicates that it voluntarily took a dismissal in order to appeal the order to produce documents. In fact, the court was compelled to dismiss the case because the Government arbitrarily refused to produce a vast number of documents in spite of the fact it did not have a color of an objection to most of them.[1]

[1] See Government's Memorandum, p. 4 n. 3 which notes that it would not give Leggett & Platt more than an estimate of even the number of documents withheld.

II. FAILURE OF THE SUPREME COURT TO TAKE THIS CASE WILL EFFECTIVELY DENY JUDICIAL REVIEW OF THE ISSUES PRESENTED

The Government's basic argument is that the case should not be reviewed by the Supreme Court because the district court must again look at the documents in the light of the standards established by the Sixth Circuit. The Government's position is apparently that Petitioner will have an opportunity for review at a later date after the district court again reviews these documents. This argument overlooks the fact that if the case is remanded and Petitioner is denied access to documents under the incorrect standards established by the Sixth Circuit, Petitioner will have no effective method to appeal that issue. In similar cases, the Government has vehemently argued (with success) that document issues cannot be raised by a defendant on interlocutory appeals.[2] An appeal on a document issue after a trial would obviously be an empty victory.

III. THE GOVERNMENT FAILS TO RESPOND TO THE BASIC REASONS FOR GRANTING THE WRIT

The Government's Memorandum is most remarkable for what it does not say.

(1) The Government basically concedes that it improperly refused to produce many of the documents for which its case was dismissed. The Sixth Circuit entirely ignored the fact that most of the documents withheld were not the subject of the appeal, and the Government's refusal to produce these documents by themselves would support

[2] In United States v. International Business Mach., Inc., 539 F.2d 703 (2d Cir. 1976), when the shoe was on the other foot, IBM attempted to raise a work product doctrine issue prior to trial in a mandamus proceeding. The Government successfully argued to the Second Circuit that the issue should not be considered on mandamus.

the dismissal. The Government does not dispute that the Sixth Circuit's decision allows it to withhold numerous documents even if only one is arguably protected by some privilege. The Sixth Circuit ignored the rule of *National Hockey League*[3] that in reviewing a dismissal under Fed. R.Civ.P. 37 a court should look at the entire record.

(2) The Government does not deny that the Sixth Circuit failed to consider that the district court examined the documents *in camera*, considered affidavits and oral arguments, and generally gave full consideration to the issues involved. The Government, like the Sixth Circuit, deals almost entirely with only one of the district court's five orders, which by its terms was addressed to a limited issue. The Government does not dispute that the district court was within its discretion if, as Petitioner contends, the court found that the documents were relevant and that Petitioner's need for them outweighed the Government's claims of conditional privilege. The record as a whole reflects that the district court made such findings, but the Sixth Circuit failed to consider the entire record as required by *National Hockey League.*

(3) The Government fails to address the burden placed on district courts and litigants by the Sixth Circuit's overly strict standards for the proof of relevancy and need. The Government does not dispute the practical impossibility of compliance with these standards by a defendant who seeks documents as to which he is denied access or even

[3] The Government attempts to distinguish National Hockey League v. Metropolitan Hockey Club, Inc., 96 Sup.Ct. 2778 (1976) on the basis that the dismissal in the instant case was not intended as a sanction. As discussed above, this is simply not correct. The basic teaching of *National Hockey League* is that a court of appeals should look at the entire record in reviewing a dismissal for failure to comply with a discovery order. The Government effectively admits that the Sixth Circuit did not look at the entire record. Therefore, the Government's attempted distinction of *National Hockey League* is unpersuasive.

knowledge by the Government. The Government does not contest the Sixth Circuit's apparent presumption that Justice Department documents, without further proof, are all generated in anticipation of litigation and thereby shielded as work product. It does not dispute that the Sixth Circuit apparently required findings of fact on these issues in direct contravention of Fed.R.Civ.P. 52(a). The Government's silence on these points effectively concedes that the Sixth Circuit's overly strict requirements virtually immunize its documents from discovery by Petitioner or other defendants bound by the decision, even where those documents are vital to the defendant's case.

(4) The Government's discussion of work product ignores the fact that the Sixth Circuit has extended the doctrine beyond all previous case law by applying it to documents in closed investigations which never matured into litigation. The Government's silence as to this new rule of law is deafening.[4]

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[4] The Government's attempt to justify its establishment of different work product doctrines in different circuits is unpersuasive. The Government cites two cases wherein *subsequent* to the dismissal in the instant case it has continued to seek documents from defendants which would be privileged under its reasoning in this case. (See Government's Brief p. 5 n. 6). The Government's argument that the inconsistency in its positions was brought to the attention of the Sixth Circuit is misleading. Petitioner was compelled to bring this matter to the attention of the Sixth Circuit when the Government failed to do so.

CONCLUSION

For the reasons set forth in the Petition, the Court should grant certiorari in this case.

Respectfully submitted,

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